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IN THE

Supreme Court of the United States

October Term, 1962

No. 700

HARBOR CARRIERS OF THE PORT OF NEW YORK AND ITS MEMBERS,

v.

NATIONAL LABOR RELATIONS BOARD.

GALLAGHER BROS. SAND & GRAVEL CORP., BILKAY HOLDING CORP., HAMPTON SCOWS, INC., NEPTUNE LINE, INC. and ROCKVILLE SCOWS, INC.,

v.

NATIONAL LABOR RELATIONS BOARD.

NATIONAL LABOR RELATIONS BOARD,

v.

CHARLES J. KING and DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION, AFL-CIO.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF RESPONDENT DECK SCOW CAPTAINS LOCAL 335, UNITED MARINE DIVISION, NATIONAL MARITIME UNION AFL-CIO, IN OPPOSITION

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Opinions Below

The opinion of the Court of Appeals is reported at 306 F. 2d 89. The order denying the petition for rehearing is not reported but is reproduced as Appendix B, pages 40-41 of the petition herein. The National Labor Relations Board's (hereafter "the Board") Finding of Facts to-

gether with its Decision and Order are reported at 136 NLRB No. 79.

Jurisdiction

The last decree of the Court below was entered on October 1, 1962. The within petition was filed on December 28, 1962. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Questions Presented

1. Whether a charging party (in a National Labor Relations Board proceeding) has *per se* standing in the Court to petition for certiorari which would bring about the enforcement of a Board order denied enforcement by the Court of Appeals where the Board does not so petition.

2. Whether certiorari may be granted in other than a case of conflict of courts of appeal or for important questions affecting the public interest.

3. Whether the regularity of the appointment of an administrator, not being an issue in the Board proceeding, may now be raised by the charging party.

Statement

Local 335, United Marine Division, National Maritime Union, AFL-CIO (hereinafter called "Local 335, UMD"), has been for many years a chartered local of the United Marine Division, National Maritime Union, AFL-CIO, and has had collective bargaining contracts with the (Harbor Carriers) Association members. The last contract was for the period May 1, 1959, to March 31, 1961. During this period, in May, 1960, a group within Local 335, UMD, started a movement to disaffiliate Local 335 from the UMD. A special meeting of Local 335 was allegedly called for May 29, 1960, to vote on the proposed disaffilia-

tion; at the meeting there was a vote of approximately 130-140 for, and 8-14 against disaffiliation, although the membership numbered 700-750.

As early as May 20, 1960, the Secretary-Treasurer of the UMD, a Mr. Willard Quick, wrote the Association informing them that Local 335 was having internal troubles and that a Mr. Thomas Anglim had been appointed temporary administrator and would handle the affairs of Local 335, UMD. On May 29, 1960, the disaffiliated group also served notice on the Association that they were administering the labor contracts of Local 335. On June 19, 1960, the disaffiliated group affiliated themselves with the National Maritime Union's rival in the AFL-CIO, the Seafarers' International Union. The jurisdictional question of who was raiding whom (*NMU* v. *SIU*) was put to the President of AFL-CIO, and he ordered SIU to withdraw its charter. The SIU withdrew its charter in September, 1960.

The disaffiliated group (hereafter the "Independent") filed unfair labor practice charges against the Association and Local 335, United Marine Division. The charges terminated in the issuance on April 4, 1962, of an order against the Employer Association and Local 335, UMD. Both the Association and Local 335, UMD, petitioned the Court of Appeals (Second Circuit) to review the Board's order and set it aside. The Board petitioned for enforcement. Independent sought to intervene as a party but its motion was denied; it was however, permitted to intervene only for the purpose of filing a brief and presenting oral argument in support of the Board's petition for enforcement. The Court of Appeals, in its decision, refused enforcement and set aside the Board's order. Rehearing was denied.

QUESTION 1

Only the NLRB has the right to petition for certiorari in reference to one of its orders.

The legislative Act which created the Board has the force of charging the Board with the protection of certain rights in the public interest. To hold it permissible for a private party to institute proceedings for enforcement would usurp the authority of the Board and violate the obvious intent of the Act, since it is by means of such proceedings that the Board implements its decisions and administers the Act. That this is the law is clear from the following statement of this Court in referring to an NLRB order in *Amalgamated Utility Workers* v. *Consolidated Edison Company* (309 U. S. 261).*

> "As the court has no jurisdiction to enforce the order at the suit of any private person or group of persons, we think it clear that the court cannot entertain a petition for violation of its decree of enforcement save as the Board presents it." (309 U. S. 270)

In *The Mine Mill and Smelter Workers* v. *Eagle-Picher Mining and Smelting Company* (325 U. S. 335) the court held that although Unions have standing to *contest* Board orders, the sole authority to institute proceedings for *enforcement* of a Board order lies with the Board.

At the Court of Appeals level the Independent did not petition for review of the Board's order but was permitted to intervene for the purpose of submitting a brief and presenting oral argument in support of the Board's petition for enforcement. The Independent was denied the right to intervene as a party to the action by the Court of Ap-

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* See also *Amalgamated Meat Cutters, etc.* v. *N. L. R. B.*, 267 F. 2d 169-170; CA-1 cert. denied, 361 U. S. 863; *Aluminum Ore Co.* v. *N. L. R. B.*, 131 F. 2d 485 and 488 (CA-7, 1942); *Halcston Drug Stores, Inc.* v. *N. L. R. B.*, 190 F. 2d 1022 (CA-9, 1951); *N. L. R. B.* v. *Florida Citrus Canners Cooperative*, 288 F. 2d 630 (CA-5, 1961).

peals, and did not appeal the denial. Thus, in the Court of Appeals action, the Independent did not petition for enforcement, nor was it a respondent, nor any other type of party to the action, and was indeed denied the right to be a party to the action. It was merely permitted to file a brief and to present arguments in the position of *amicus curiae*.

Thus, in its present petition, the Independent is attempting to substitute itself for the Board and therefore to become, on the appellate level, a party in an action to which it was originally denied the right to become a party. Nowhere can authority be found to permit an *amicus curiae* to substitute itself for the party it supports in seeking an appeal from a decision adverse to that party, if the party itself chooses not to seek an appeal. In the instant case, the Board either accepts the decision of the Court of Appeals, or for reasons which it does not disclose, prefers that the decision not be appealed. To use or not to use the processes of the courts in administering the Act lies solely and entirely with the Board, charged as it is with the responsibility of carrying out the duty delegated to it by Congress.

QUESTION 2

The review of evidence to insure conformity with the standard of review of the Act is primarily the province and function of the Court of Appeals, and in only the rare case of a failure to understand that standard or where the standard has been grossly misapplied is review in this Court warranted.

Those rare instances in which certiorari is granted are narrowly limited by the Supreme Court. In *N. L. R. B.* v. *Pittsburgh Steamship Co.* (340 U. S. 498) this Court in considering a writ of certiorari relative to a court of

appeals decision on the enforcement of a Board order stated at page 502:

> "But Congress has charged the Courts of Appeals and not this Court with the normal and primary responsibility for granting or denying enforcement of Labor Board orders. 'The jurisdiction of the court (of appeals) shall be exclusive and its judgment and decrees shall be final, except that the same shall be subject to review * * * by the Supreme Court of the United States upon writ of certiorari * * *' Taft-Hartley Act, Sec. 10, (e), 61 Stat. 148, 29 USC (Supp III) Sec 160 (e); Certiorari is granted only 'in cases involving principles the settlement of which is of importance to the public as distinguished from that of the parties, and in cases where there is a real and embarrassing conflict of opinion and authority between the circuit courts of appeal.' *Layne and Bowler Corp.* v. *Western Well Works*, 261 U. S. 387, 393; Revised Rules of the Supreme Court of the United States, Rule 38 (5)."

There is no contention in the Independent's petition that any conflict of authority among courts of appeal has been created by the ruling in question. It must be concluded therefore, in the light of the citation above, that the present petition is based on the alleged existence of a threat to the public interest. As is established in Question 1 above, if the public interest is involved, then it is up to the Board, as the body duly delegated to protect the public interest in such matters, to exercise its discretion as to the proper course of action to be taken in carrying out its function. Therefore, the present petitioner cannot request a review of evidence, since his petition does not fall within the scope of either of the two exceptions defined in the citation above.

QUESTION 3

The legality of an administrator's appointment is not an issue in this case.

Whether or not the administrator of Local 335, UMD was legally appointed within the framework of the Union's constitution or in accordance with the provisions of the Labor-Management Reporting and Disclosure Act has no bearing upon the actual existence of the Union. As the Examiner has stated in his intermediate report, p. 16:

> "The existence or non-existence of constitutional authority to support the United Marine Division's act is immaterial to the issue herein."

Since such appointment was not an issue in the Board proceedings, it is subject to review neither by the Court of Appeals nor this Court.

CONCLUSION

For the foregoing reasons, it is respectfully requested that the petition for a writ of certiorari be denied.

Respectfully submitted,

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January 25, 1963.